68156-7

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NO. 68156-7-I

COURT OF APPEALS FOR DIVISION 1
STATE OF WASHINGTON

KATTI HOFSTETTER, a single woman,

Appellant,

vs.

CITY OF BELLINGHAM, a municipal corporation,

Respondent.

CITY OF BELLINGHAM'S REPLY TO APPELLANT'S RESPONSE TO CITY OF BELLINGHAM'S CROSS-APPEAL BRIEF

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A. SUMMARY JUDGMENT AND JUDGMENT AS A MATTER OF LAW REGARDING RECREATIONAL IMMUNITY.

1. The City is entitled to the protections of the recreational land use statute because under either status Plaintiff proposes - licensee or invitee- Plaintiff was allowed on the premises.

Plaintiff was injured as a recreational user. This finding is supported by both the law and logic. In order to attain any other status, such as invitee or licensee, Plaintiff would have had to obtain consent or permission to enter the property at issue. *Singleton v. Jackson*, 85 Wn. App. 835, 839, 935 P.2d 644 (1997). In this context, whether one is an invitee or licensee, both are allowed onto the property. *Younce v. Ferguson*, 106 Wn. App. 658, 724 P.2d 991 (1986).

The language of RCW 4.24.210, therefore, contemplates recreational immunity if the user is invited, permitted, or tolerated because all of these users are "allowed." This leads to the conclusion that the recreational land use statute applies in this case because RCW 4.24.210(1) states that recreational immunity applies so long as the landowner "allows" use and Plaintiff was undisputedly injured within Whatcom Falls Park ("the park"). Thus, whether Plaintiff considers herself a licensee or an invitee, she was allowed in the whirlpool area.

An examination of the definitions of invitee and licensee support this contention. Washington courts have adopted the Restatement (Second) of Torts § 332 definition of invitee. Section 332 defines an invitee as follows:

> (1) An invitee is either a public invitee or a business visitor;
> (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public; and
> (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connection with business dealings with the possessor of the land.

Younce at 658, citing *McKinnon v. Washington Fed. Sav. & Loan Ass'n*, 68 Wn.2d 644, 650, 414 P.2d 723 (1966).

Licensees are those who have been invited or allowed who do not meet the definition of invitee. *Younce*, 106 Wn. App. at 667. In *Singleton v. Jackson* the court discussed the distinction between a licensee and a trespasser and articulated what is necessary for licensee status:

> A 'licensee,' on the other hand, is 'a person who is privileged to enter or remain on land only by virtue of the possessor's consent.' *Tincani*, 124 Wn.2d at 133, 875 P.2d 621 (quoting Restatement (Second) of Torts § 330). Thus, the determination of whether a person is a trespasser or a licensee hinges on whether the possessor has granted consent or permission to enter the property.

Singleton, 85 Wn. App. at 839 (emphasis added).

Licensee status, therefore, requires a showing that Plaintiff was allowed into the area based on consent or permission. If Plaintiff was allowed onto the property based on the consent or permission of the City, then the recreational land use statute applies because it applies when the landowner "allow[s] members of the public to use" the land. RCW 4.24.210.

"Allowing" one to enter a premises is synonymous with "permission." This is evident in a California court's reasoning with respect to licensee status: "Mere permission of an owner or allowing a person to enter and use a certain portion of the premises is indicative of a licensee merely and not of an invitation." *Fisher v. General Petroleum Corp.*, 123 Cal. App. 2d 770, 778, 267 P.2d 841, 845, (Cal. Dist. Ct. App. 1954) (emphasis added). Likewise, Washington courts and courts from other jurisdictions have used the term "allow" synonymously with granting a license or permission to enter a premises. *See e.g. Genie Industries, Inc. v. Market Transport, Ltd*, 138 Wn. App. 694, 701-02 (2007); *Keck v. Doughman*, 392 Pa. Super. 127, 135, 572 A.2d 724, 728 (Pa. Super. Ct. 1990). Thus "to allow" one to enter property is synonymous with "to permit" one to enter property. The recreational land use statute applies, therefore, to licensees and invitee's alike.

The language of the recreational land use statute merely envisions that a landowner "allow" use. RCW 4.24.210(1). Plaintiff cannot assert invitee statutes (which requires a showing that the land was held open) without application of the recreational use statute (which flows from a finding that the land was held open). Similarly, if Plaintiff was a licensee, she was permitted to be on the property and the recreational land use immunity statute applies. If Plaintiff had any form of consent, permission, or invitation to be on the premises at issue it is irrefutable that she and other visitors were allowed onto the property.

Plaintiff argues that she was a public invitee when she entered the park. CP 801, 805. However, in Washington, an entrant to a public park is a park user, not an invitee. *See State v. Davis*, 102 Wn. App. 177, 6 P.3d 1191 (2000). It is undisputed that Plaintiff was within the boundaries of Whatcom Falls Park. Plaintiff, therefore, was a park user under *Davis*.

Plaintiff's reliance on *Tincani v. Inland Zoological Society*, 124 Wn.2d 121 (1994), is misplaced because it did not involve recreational immunity. The plaintiff in *Tincani* was unquestionably an invitee: he was patronizing a zoo and paid a fee in exchange for entrance. *Tincani* at 125. The court in *Tincani* examined the duties owed to the plaintiff when he strayed from the area of invitation, and became a licensee. *See Tincani* 133-143.

Plaintiff argued that *Tincani* was analogous and that she became a licensee when she strayed beyond the area of invitation. CP 805. This argument fails for two reasons. First, Plaintiff was not an invitee, she was a park user. This principle is uncontroverted and unassailable in Washington: a park user is a distinct and separate land status (and is in addition to invitee, licensee and trespasser). *See Davis*.

Second, if, as Plaintiff argues, she was a licensee or an invitee when she was injured, she was in the whirlpool area with the City's consent and permission. Likewise, when Plaintiff was in the general areas of the park, she was there with the City's consent and permission. Therefore, Plaintiff's status did not change when she entered the whirlpool area (she had consent and permission in both areas). Further, if she was in both the park, in general, and the whirlpool area with the City's consent or permission, she was allowed. Since Plaintiff was allowed when she entered the park, she maintained that status in the whirlpool if she was invited or permitted (as she argues) because she was still allowed under the definition of invitee or licensee. Her status did not change.

By its very terms, the recreational use statute encompasses invitee and licensee status by using the word "allowed." The status of park user is therefore maintained throughout the entire park. Plaintiff's status did not change to licensee or invitee when she entered the whirlpool area because

she was still in the park. And, under either the definition of invitee or licensee, she was still allowed.

While Plaintiff argues the City has no case law that says a person's status on lands "becomes fixed," the recreational land use statute and common law definitions are controlling and lead to this conclusion. The definition of allowed encompasses and accounts for invitees and licensees because both involve consent and permission. In terms of a park that is open for use, the status on the entirety of the land cannot be anything but a recreational user given the legal definitions of licensee, invitee, and recreational user. There is no other logical interpretation of the law.

2. The intent of the statute and public policy justify giving the City recreational land use immunity in this case.

The failure to grant the City recreational immunity under these circumstances penalizes the City for erecting a warning sign. RCW 4.24.200 encourages landowners to open lands and speaks in terms of land areas. Whatcom Falls Park is the land area at issue for purposes of determining application of the recreational land use statute. The Washington State Legislature did not intend to penalize a landowner for attempting to restrict use in one specific area of a park or other open area. *See* RCW 4.24.200.

Plaintiff's arguments were implicitly rejected in *Preston v. Pierce Cy.*, 48 Wn. App. 887, 741 P.2d 71 (1987), *overruled on other grounds*, *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 846 P.2d 522 (Wash. Mar 04, 1993). In *Preston*, Pierce County staff had painted "keep off" on a piece of playground equipment, equipment that later injured a child. The *Preston* court applied the recreational use statue despite the "keep off" directive. Likewise, a sign that purports to close a specific section of a park should not operate to destroy recreational immunity (especially when Plaintiff argues the sign was not present). This punishes a landowner for placing a strongly worded warning sign.

This sentiment was recently echoed by the Washington Supreme Court in *Cregan v. Fourth Memorial Church*, 175 Wn.2d 279, 285 P.3d 860 (2012), which held that a landowner can restrict use of the property without losing recreational immunity. Plaintiff argues *Cregan* is not helpful to the analysis in this case, but its reasoning is directly applicable. The court explicitly held that an owner could impose restrictions on land without losing immunity. *Cregan* at 864. The court noted that so long as the land was open to all members of the public, immunity would be retained. *Id.*

The facts in this case show that the red "do not enter" sign was left at the whirlpool as a warning sign and was not meant to exclude users.

The sign is similar to several other signs in the park that encourage users to stay on the formal trails in the park. For example, there are signs that warn users to "stay on path," "stay on gravel trails," and "forest recovery zone, stay out!" Ex. 46 Ex. 49, Ex. 50. These signs are designed to discourage users from wandering from the maintained portions of the park to the undeveloped, natural, and rugged areas. Accordingly, Marvin Harris' expression that the sign should be kept up because users "should" stay out of the whirlpool is consistent with the overall signage and philosophy in the Park. The signs are there to encourage staying in the developed portion of the park and not to exclude users.

Applying the recreational use statute as written, i.e. whenever a landowner allows recreational use in the general area at issue, is good public policy because it allows municipalities and other landowners to issue strong directives and warnings within larger recreational areas in order to control use of the land for the safety of the public. If a landowner can be held liable for posting a warning sign because the sign expressed some type of "intent" that the land is not open, then landowners will likely refuse to post any sign at all or pull their lands from public use entirely.

3. The City was entitled to summary judgment because Plaintiff has not refuted the fact that the Whirlpool was open for use.

In response to the City's cross-appeal, Plaintiff again argued the City was not entitled to summary judgment or a judgment as a matter of law based on recreational land use immunity because the whirlpool area was not open for recreational use. Plaintiff argues that one piece of evidence precludes a judgment as a matter of law and summary judgment for the City: the red "do not enter" sign. More specifically, Plaintiff believes the wording on the sign iteslf precludes summary judgment because the wording of the sign shows the City intended to close the whirlpool area. *See* Pl. Response Br. at 26.

What Plaintiff continues to ignore and overlook is the substantial evidence explaining what the sign meant, the City's intent, and the City's practice. Plaintiff's only argument and evidence is what the sign says, but there is no testimony disputing the City's intent or practice. At trial and the summary judgment hearing, the City presented the sign as evidence along with its intent and the practice of allowing users in the area. It was incumbent on Plaintiff to bring forth evidence refuting the City's evidence about the intent of the sign and practice of allowing use. Plaintiff failed to meet that obligation.

While the Court is required to look at the evidence in a view favorable to the non-moving party for summary judgment, this does not mean the Court can ignore evidence. The record shows Plaintiff did

nothing more than offer the language of the sign as a disputed fact. But, the language of the sign was never in dispute. Plaintiff failed to produce any evidence refuting the City's intent and practice of allowing use. Properly analyzed, the evidence shows that there is no dispute that Plaintiff was allowed.

For clarity and review, the following facts relevant to this issue are undisputed:

- Whatcom Falls Park is a City park open for recreational use without a fee. RP 1055, CP 504, 841. The City has designated the entire park for recreation and open space and offers several recreational opportunities to visitors. CP 504. The whirlpool area is natural and undeveloped and is within Whatcom Falls Park. RP 294-95, RP 856, RP 744-745.
- There was a "do not enter" sign located near the whirlpool. RP 708, Ex. 1. Specifically, the sign was located behind a fence that lined the formal park trail above and adjacent to the whirlpool. Ex. 1. None of the witnesses involved in this case disputed what the sign actually said. *See* RP 91, RP 161, RP 659, and PRP 15.

- The sign was erected in 1999 for environmental reasons after a gas pipeline explosion in the park. RP 248-49, RP 686, CP 504-509. As the years went by after the explosion, park users gradually began using the whirlpool for recreational purposes again. RP 732, RP 1134, CP 506-507.
- Specifically, park employee James Luce testified that after 1999 he was never aware of a policy or effort to exclude users, the "do not enter" sign related to the burn zone, and that use of the whirlpool was steady and normal in the years after the explosion, including 2005. RP 686-708, RP 732, CP 533-34 ¶ ¶ 3,4.
- City employee Clare Fogelsong similarly stated that the "do not enter" sign did not prevent jumping and swimming and that public use of the whirlpool resumed after the explosion. CP 546-537 ¶¶ 7, 9.
- Park employees Wayne Carroll and Scott Zerba also testified that the public was not excluded from the whirlpool and use was common and heavy. RP 531-532, RP 602.
- Park employee Richard Rothebuehler testified that the whirlpool area was closed due to environmental concerns

after the explosion. PRP 32-33. He further stated that employees were asked to assist the security guards, in place after the explosion, to keep users out of the area but that over time employees stopped asking users to refrain from use. PRP 32-33. Finally, Rothenbuehler stated he was never actually told the burnzone was open but did acknowledge the area was heavily used after the explosion and specifically in 2005. PRP 573-574.

- Parks Operation Manager Marvin Harris testified that the sign in question was intended to be a warning sign and that the whirlpool was "part of the park." RP 168, 230-231. Harris testified numerous times throughout the trial that park visitors were allowed to use the whirlpool. RP 255, RP 275, RP 278, RP 1143. Harris also filed a declaration stating that there are thousands of visitors to the whirlpool on an annual basis and there was no rule prohibiting use in 2005. CP 506 ¶ 10.
- Eight days before Plaintiff's accident, Harris emailed another City employee, writing that the whirlpool area was part of the park and that the "do not enter" sign should

> remain in place as a warning sign. PRP 33-34, RP 255. In that email Harris wrote that users should stay out of the whirlpool but it was considered part of the park. PRP 33-34, RP 255, Ex. 23. By leaving the "do not enter" sign up to serve as a deterrent or warning, Harris reasoned that this was analogous to other signs in the Park that encouraged users to stay on the formal park trails as opposed to the rugged, undeveloped areas. CP 508-509 ¶ 11. For example, there are several signs in the Park that tell users to "stay on path." *See* Ex. 46 Ex. 49, Ex. 50.

No witness testified that the area was actually closed or refuted the testimony of the City witnesses about the intent of the sign or the practice of allowing use. Plaintiff baldy asserts "there existed a genuine dispute as to whether the City intended to allow outdoor recreation in the whirlpool area." Pl. Response Br. at 29. But, this simply is not true. Everyone agreed that the intent and practice of the City was to allow use. All of the witnesses also testified that users freely used the whirlpool and the City did not exclude anyone in the relevant time period. Plaintiff did not refute any of this evidence by merely pointing to the red sign.

Furthermore, *Cultee v. City of Tacoma*, 95 Wn. App. 505, 977 P.2d 15 (1999), is distinguishable because witnesses in that case expressly

stated the land in question was not open to the public at large. In *Cultee*, the City of Tacoma passed a resolution declaring the ranch lands in question were recreational and within RCW 4.24.210. *Cultee* at 509. In determining whether the statute was applicable, the court looked at whether the land was indeed open to the public. *Id.* at 514.

Specifically, the court cited testimony from two current caretakers of the property and the previous caretaker. *Id.* The caretakers testified that the land was not open to the general public and was only open to local tribe members. *Id.* The court held that it could not rule as a matter of law that the land was open to the public because there was conflicting testimony on that issue. *Id.* at 515.

Here, there was no conflict. There was no testimony indicating the City allowed some users in the whirlpool but not others. Not a single person testified that the practice and intent of the City was to restrict use of the area. To the contrary, all of the witnesses testified that the area was heavily used and Parks' had no intention of excluding users. Because there is no conflicting testimony as to whether Plaintiff was allowed in the whirlpool area, the City is entitled to the protections of the recreational land use statute. The City is therefore entitled to summary judgment and judgment as a matter of law.

4. It is axiomatic in Washington that if a landowner opens his lands for recreational use without charging a fee, the landowner is protected by the recreational land use immunity statute.

Plaintiff states: "The City then proceeds, with little supporting analysis, to the sweeping conclusion, citing *Gaeta*, *Id.*, [sic] at 609, that if the landowner opens land for recreational use without charging a fee, the landowner has brought himself within the protection of the recreational land use statute." Pl. Response Br. at 28.

While Plaintiff takes umbrage with this legal principle, it is axiomatic in Washington. The *Cultee* court stated: "To determine whether the statute applies, we view the circumstances from the standpoint of the landowner or occupier." *Cultee* at 514. The *Gaeta* court stated: "We find the proper approach in deciding whether or not the recreational land use act applies is to view it from the standpoint of the landowner or occupier." *Gaeta v. Seattle City Light*, 54 Wn. App. 603, 608-609 (1989). The court went on in its ruling to state: "By opening its lands for recreational use without a fee, City Light [the landowner] has brought itself under the protection of the immunity statute..." *Id.*

Plaintiff further argues that the intent of the City is irrelevant in this case. Pl. Response Br. at 29. But, the City's intent must be considered by the Court in determining whether the land was open for recreational use or not. This, again, is axiomatic in Washington. *See Cultee and Gaeta.*

The *Gaeta* court considered the intent of the landowner in determining that the Diablo Dam roadway was open for recreational use rather than a commercial purpose. *Gaeta* at 608-609. The court used this same analysis to determine that the Deception Pass Bridge was open for recreation even though the injury occurred on a sidewalk alongside a highway. *Chamberlain v. Dept. of Transportation*, 79 Wn. App. 212, 218, 901 P.2d 344 (1995). Finally, the court determined that the Burke-Gilman Trail in King County was recreational land even though the plaintiff argued he was commuting on the trail. *Riksem v. City of Seattle*, 47 Wn. App. 506, 512 (1987).

Plaintiff argues that the holdings from these cases allow a landowner to merely assert an intent consistent with RCW 4.24.210 to come within the immunity provisions. Pl. Response Br. at 31. But, the City did more than merely claim its intent was to allow recreational activity. As outlined above, the City presented evidence that users were in fact allowed to recreate in the Whirlpool area. It is not a bald assertion with no supporting evidence. To the contrary, the evidence shows the area was heavily used and this evidence corroborates the testimony regarding the City's intent.

Plaintiff's argument also suggests that the placement of a "do not enter" sign means the City could not have intended the area to be open for

use. But, the facts show that the intent of the sign and practice of the City changed over time. The whirlpool area was temporarily closed after the explosion in 1999, but eventually use of the area went back to normal levels and park users recreated at the Whirlpool routinely. While Plaintiff fixates on the language of the sign, the evidence shows that park users were allowed to recreate in the Whirlpool in 2005. Plaintiff is relying on a relic of the burnzone to argue the area was closed. This despite the fact that the City did not have a policy to exclude users, the Whirlpool was used by thousands in the community, and the City stated approximately one week before Plaintiff's accident that the sign was meant to be only a warning sign.

Because Plaintiff failed, at trial and at the summary judgment hearing, to demonstrate a disputed fact, the City's motions should have been granted. Because there was no material dispute as to whether users were allowed in the area, as a matter of law, the protections of the recreational land use statute applied to the City. The Court should grant the City's cross-appeal on this basis.

B. Summary Judgment/Judgment As A Matter Of Law Regarding Latent And Artificial Condition Under RCW 4.24.210.

Whether the Court determines the injury causing condition was the "wet spot," the cliff side, or a combination of the two, the condition was

not latent or artificial. Plaintiff has failed to refute the record cited by the City that almost every witness who testified about the condition of the trail stated the wetness was visible. *See* PRP 12, PRP 108, RP 931, RP 1000, RP 1093, RP 358, RP 70. Plaintiff herself conceded she could see the wet spot. RP 757, Pl. Br. 21. If a condition is visible, it cannot be latent. In other words, if the condition is apparent so that a user can take "visual reference of it," the condition is not latent as a matter of law. *Swinehart v. City of Spokane*, 145 Wn. App. 836, 848, 187 P.3d 345, 351-52 (2008).

Similarly, there is no evidence to support Plaintiff's argument that the cliff side was latent. To the contrary, a look at the evidence and the exhibits admitted at trial show that the cliff side was open and obvious. *See* Ex. 4-6, Ex. 8, Ex. 15, Ex. 17, Ex. 61, and Ex. 75. Given its open and obvious nature, Plaintiff's argument that the cliff side could be considered latent is strained at best and is not supported by the case law.

Further, as the City pointed out in its brief, Washington courts have only found potential latent conditions when the condition is completely hidden from the user. These cases are *Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 969 P.2d 75 (1998), where a stump was submerged; *Tabak v. State*, 73 Wash.App. 691, 870 P.2d 1014 (1994), where faulty bolts on a dock were located underneath the dock; and *Cultee v. City of Tacoma*, where the edge of a road was

submerged in tidal waters. A visible wet spot and an open cliff side, therefore, cannot be considered latent under RCW 4.24.210.

As to the question of whether the condition was artificial or not, Plaintiff has not refuted the reasoning from *State v. Davis*, 144 Wn.2d 612, 30 P.3d 460 (2001) that the trail and cliff side are natural. Plaintiff's argument is conclusory and simply states the "trail is not natural." Pl. Response Br. at 34. But, *Davis* stands for the proposition that a naturally existing condition is not altered simply because of use by man. The use of the path in question did not alter the cliff side. The open cliff side is in its natural state and is therefore not artificial.

Because the condition was patent and natural, the City was entitled to summary judgment and judgment as a matter of law on this issue. Because recreational immunity applies (*see* above) and Plaintiff cannot overcome the latent and artificial qualifiers necessary to overcome immunity, the City is entitled to recreational land use immunity and judgment as a matter of law.

C. FAILURE TO GIVE INSTRUCTION NO. 29, TRESPASSING.

In response to the City's argument that a trespasser instruction was necessary, Plaintiff offers two arguments: (1) not giving the instruction was harmless error and (2) "plaintiff cannot be considered a trespasser

unless she was fully aware that the Whirlpool was closed to the public and she chose to enter the area anyway." Pl. Response Br. at 34-35.

First, Plaintiff's harmless error argument misunderstands the City's posture on its cross appeal. As articulated in the City's brief, the City is asking the Court to dismiss the Plaintiff's appeal and uphold the jury's verdict. Resp't Br. at 50. In the event the Court grants Plaintiff relief in some form, the City is asking the Court to review its cross appeal. Resp't Br. at 50.

The City would therefore concur with Plaintiff that if the Court dismisses her appeal and upholds the verdict, the failure of the trial court to give the trespasser instruction was harmless error. But, the City is asking the Court to review the error if the Court grants relief because if there is a finding Plaintiff was not allowed in the whirlpool area, a trespass instruction is warranted as a matter of law. The Court does not need to address the City's cross appeal if the verdict is affirmed.

In any event, the failure to give the instruction was an abuse of discretion because the decision was exercised on untenable grounds. *See The Boeing Company v. Harker-Lott*, 93 Wn. App. 181, 186, 968, P.2d 14 (1998). The decision to omit was untenable because the instruction was supported by evidence admitted at trial. The evidence justifying the trespass instruction was the "do not enter" sign, which was admitted and

relied on by Plaintiff. If Plaintiff was not allowed as she argues, then she had to be a trespasser.

Furthermore, the failure to give the instruction was untenable because, without it, the jury was not accurately informed of the law. Under the facts at trial, if the court was going to give an instruction to determine whether Plaintiff was allowed or not, the law would dictate giving a companion instruction regarding someone who is not allowed: a trespasser.

Finally, the failure to give the instruction prevented the City from arguing its theory of the case. If Plaintiff's theory of the case was that she was not allowed in the area, she was a trespasser under the law. The City could not argue this legal certainty to the jury because of the omission of Instruction number 29. In sum, not giving a trespasser instruction under these circumstances was untenable and prejudiced the City in the presentation of the its case.

Plaintiff's second argument is not supported by law and is indeed lacking a citation to any authority. Plaintiff's argument attempts to add an element to civil trespass but does so without any authority whatsoever. A trespasser is simply someone who enters the premises without invitation or permission, express or implied. *Singleton* at 839, WPI 120.01. Plaintiff has

failed to cite any authority that expands this definition. The Court should disregard Plaintiff's argument.

II. CONCLUSION

Plaintiff was a recreational user when she was injured in Whatcom Falls Park. A landowner who allows use of recreational property without a fee is entitled to immunity. Because the immunity statute grants immunity for allowed use of lands, users who are allegedly invited or permitted are encompassed within this definition. Therefore, under any analysis, Plaintiff was recreational user who was allowed to use the land and the City is entitled to recreational immunity as a matter of law.

Further, there is no conflicting evidence about whether the City intended users to use the Whirlpool area. Nor is there evidence to dispute the City's practice of allowing heavy use of the area.

Additionally, because the injury causing condition was open, obvious and natural, the City is entitled to judgment as a matter of law on this aspect of the recreational land use immunity statute.

Finally, based on the evidence and Plaintiff's own arguments, the trial court erred in not instructing the jury on the law regarding trespassers.

For these reasons, in the event the Court does not uphold the jury's verdict, the Court should grant the City's cross-appeal and order that the case is to be dismissed with prejudice.

DATED this 19th day of February, 2013.

CITY OF BELLINGHAM

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